AMENDMENT AND RESPONSE UNDER 37 CFR § 1.111
Page 11
Serial Number: 10/696,729
Dkt: 279.652US1
Filing Date: October 29, 2003
Title: CROSS-CHECKING OF TRANSTHORACIC IMPEDENCE AND ACCELERATION SIGNALS

REMARKS

This responds to the Office Action dated June 1, 2006, and the references cited therewith. Claims 1, 11, 14, 21, and 53 are amended, no claims are canceled, and no claims are added; as a result, claims 1-55 remain are pending in this application.

Claims 1, 11, 14, 21, and 53 are amended to more clearly recite the claimed subject matter and not for purposes of overcoming particular art. It is believed that no new matter is introduced and that the amendments are supported by the specification.

§101 Rejection of the Claims

Claims 1-20 and 53-55 were rejected under 35 U.S.C. § 101 on the grounds that the claimed invention was directed to non-statutory subject matter.

It is believed that amended claims 1, 11, 14, and 53 recite statutory subject matter. Reconsideration and withdrawal of the rejection is respectfully requested.

Furthermore, the Office Action includes a citation to a portion of 35 U.S.C. § 112 in conjunction with a discussion of 35 U.S.C. § 101. Applicant requests clarification along with a full opportunity with which to respond.

Applicant is unable to find, in the Office Action, a detailed action regarding the § 101 rejection of independent claim 14. Withdrawal or clarification is respectfully requested.

§102 Rejection of the Claims

Claims 1, 4, and 5 were rejected under 35 U.S.C. § 102(b) for anticipation by Schuelke et al. (U.S. Patent No. 5,755,742).

Applicant respectfully traverses the rejection and submits that *prima facie* anticipation has not been established. In particular, Applicant is unable to find, in the cited document, a disclosure of each element of the claim under consideration. Applicant is unable to find in Schuelke, a disclosure of a processor adapted to generate a code as a function of a relationship between the first impedance information and the second impedance information. The citations noted in the Office Action do not appear to disclose the claimed subject matter.

As to dependent claims 4 and 5, Applicant notes that each recites elements in addition to those recited in the base claim. For at least the reasons noted herein, Applicant submits that claims 4 and 5 are in condition for allowance.

Applicant respectfully requests reconsideration and allowance of claims 1, 4, and 5.

Claims 1, 2, 7, 11-15, 17-21, 23-31, 35, 36, 46-48, 50, 51-53, and 55 were rejected under 35 U.S.C. § 102(e) for anticipation by Hiebert et al. (U.S. Patent Publication No. 2003/0114891 A1).

Applicant respectfully traverses the rejection and submits that *prima facie* anticipation has not been established. In particular, Applicant is unable to find, in the cited document, a disclosure of each element of the claim under consideration. For example, Applicant is unable to find in Hiebert, a disclosure of a processor coupled to the first pair of electrodes and the second pair of electrodes and adapted to identify a relationship between the first impedance information and the second impedance information and adapted to generate a code as a function of the relationship between the first impedance information and the second impedance information, as recited in claim 1. The Office Action refers to selected paragraphs of Hiebert but at those portions, Applicant is unable to find the recited element.

The Office Action includes an assertion concerning "a code that is a function of a relationship between the impedance information" with citation to Hiebert "pp. [0053] & [0056]." At the cited portions, however, Applicant is unable to find support for such a code. Withdrawal of the assertion is respectfully requested.

Furthermore, Applicant is unable to find in Hiebert, a disclosure of a processor adapted to calculate a confidence level, as recited in claim 11. The Office Action appears silent and Applicant is unable to find such a disclosure in the record. Withdrawal of the rejection is respectfully requested.

As to claim 14, Applicant is unable to find in Hiebert, a disclosure of a processor adapted to identify a relationship between the first signal and the second signal and generate a code as a function of the relationship. The Office Action appears silent and Applicant is unable to find such a disclosure in the record. Withdrawal of the rejection is respectfully requested.

In addition, Applicant is unable to find in Hiebert, a disclosure of a processor adapted to generate a code based on a detected similarity between the first ventilation signal, the second ventilation signal and the first acceleration signal, as recited in claim 21. The Office Action appears silent and Applicant is unable to find such a disclosure in the record. Withdrawal of the rejection is respectfully requested.

Furthermore, Applicant is unable to find in Hiebert, a disclosure as to identifying a first relationship between the first ventilation rate and the second ventilation rate, and generating a code as a function of the first relationship, as recited in claim 25. The Office Action appears silent and Applicant is unable to find such a disclosure in the record. Withdrawal of the rejection is respectfully requested.

In addition, Applicant is unable to find in Hiebert, a disclosure of a processor adapted to identify a similarity between the first ventilation signal and the second ventilation signal and store a code having a value based on the similarity, as recited in claim 29. The Office Action appears silent and Applicant is unable to find such a disclosure in the record. Withdrawal of the rejection is respectfully requested.

Furthermore, Applicant is unable to find in Hiebert, a disclosure as to using a processor to detect a similarity in each input signal of the plurality of input signals, as recited in claim 46. The Office Action appears silent and Applicant is unable to find such a disclosure in the record. Withdrawal of the rejection is respectfully requested.

In addition, Applicant is unable to find in Hiebert, a disclosure of a processor means adapted to generate a code as a function of a detected similarity between the first ventilation signal, the second ventilation signal and the first acceleration signal, as recited in claim 53. The Office Action appears silent and Applicant is unable to find such a disclosure in the record. Withdrawal of the rejection is respectfully requested.

Applicant does not admit that Hiebert is prior art and reserves the right to swear behind such document at a later date.

The Office Action does not appear to include a statutory rejection of claim 33. Page 4 of the Office Action, however, discusses claim 33. Clarification and a full opportunity with which to respond is respectfully requested.

Page 3 of the Office Action refers to a rejection of claim 50, however, Applicant is unable to find a detailed discussion regarding a rejection of claim 50. Clarification and a full opportunity with which to respond is respectfully requested.

As to dependant claims 2, 7, 12, 13, 15, 17-20, 23, 24, 26-28, 30, 31, 35, 36, 47, 48, 50-52, and 55, Applicant notes that each recites elements in addition to those recited in the corresponding base claim. For at least the reasons noted herein, Applicant submits that claims 2, 7, 12, 13, 15, 17-20, 23, 24, 26-28, 30, 31, 35, 36, 47, 48, 50-52, and 55 are in condition for allowance.

Applicant respectfully requests reconsideration and allowance of claims 1, 2, 7, 11-15, 17-21, 23-31, 35, 36, 46-48, 50, 51-53, and 55.

Claims 14 & 17 were rejected under 35 U.S.C. § 102(e) for anticipation by Ternes (U.S. Patent Publication No. 2005/0065443 A1).

Applicant respectfully traverses the rejection and submits that *prima facie* anticipation has not been established. In particular, Applicant is unable to find, in the cited document, a disclosure of each element of the claim under consideration. For example, Applicant is unable to find in the cited portions of Ternes, a disclosure of a first sensor to provide a first signal representative of a first ventilation rate derived from a first chamber of a heart, and a second sensor to provide a second signal representative of a second ventilation rate derived from a second chamber of the heart, as recited in claim 14. In addition, Applicant is unable to find, in the cited document, a disclosure of a processor adapted to identify a relationship and generate a code as a function of the relationship. The Office Action refers to paragraphs [0029], [0030], and [0045] of Ternes but at those portions, Applicant is unable to find the recited element. Withdrawal of the rejection is respectfully requested.

As to dependant claim 17, Applicant notes that it recites elements in addition to those recited in the base claim. For at least the reasons noted herein, Applicant submits that claim 17 is in condition for allowance.

Applicant does not admit that Ternes is prior art and reserves the right to swear behind such document at a later date.

Applicant respectfully requests reconsideration and allowance of claims 14 and 17.

§103 Rejection of the Claims

Claim 32 was rejected under 35 U.S.C. § 103(a) as being unpatentable over Hiebert et al. (U.S. Patent Publication No. 2003/0114891 A1).

Claim 32 is based on independent claim 29. Applicant submits that claim 29, and therefore claim 32 are in condition for allowance, for at least the reasons presented herein.

Applicant respectfully traverses the rejection and submits that *prima facie* obviousness has not been established. The Office Action rejects the claim using 35 U.S.C. 103 and relies on the language of 35 U.S.C. 102(e).

Applicant respectfully submits that Hiebert is not prior art with respect to the claims of the present application. A reference asserted under 102(e) that was commonly owned with an application at the time the invention was made, cannot preclude patentability under 35 U.S.C. 103 of the claims of the application when the application was filed on or after November 29, 1999. *35 U.S.C. 103(c); 1233 OG 55 (April 11, 2000).* The present application was filed on October 29, 2003 which is after November 29, 1999. Hiebert, and the present application were, at the time the invention was made, owned by, or subject to an obligation of assignment to, the same entity.

Thus, Hiebert is commonly owned with the present application and is not prior art with respect to the claims of the present application. Therefore, Applicant respectfully requests withdrawal of the rejection and reconsideration and allowance of claim 32.

Allowable Subject Matter

Claims 38-45 were allowed.

Claims 8-10, 16, 22, 34, 37, 49, 52, and 54 were objected to as being dependent upon a rejected base claim, but were indicated to be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. Applicant respectfully submits, for at least the reasons presented herein, that each claim is in condition for allowance. Reconsideration and allowance is respectfully requested.

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Page 16
Dkt: 279.652US1

CONCLUSION

Applicant respectfully submits that the claims are in condition for allowance, and notification to that effect is earnestly requested. The Examiner is invited to telephone Applicant's attorney at (612) 373-6911 to facilitate prosecution of this application.

If necessary, please charge any additional fees or credit overpayment to Deposit Account No. 19-0743.

Respectfully submitted,

SCOTT FREEBERG

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Date October 31, 2006   By _____

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CERTIFICATE UNDER 37 CFR 1.8: The undersigned hereby certifies that this correspondence is being filed using the USPTO's electronic filing system EFS-Web, and is addressed to: Commissioner of Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on this _3/_ day of October, 2006.

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Name

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Signature